



May 14, 2001

Ms. JoAnn S. Wright
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
P.O. Box 168046
Irving, Texas 75016-8046

OR2001-1975

Dear Ms. Wright:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 147191.

The Yoakum Independent School District (the "district"), which you represent, received a request for information relating to an employee's grievance against the principal of the primary school. You inform us that the district has released all information held by the district that is responsive to item nos. 1 and 3 of the request and other information that is responsive to item nos. 2 and 4.¹ You claim, however, that other information encompassed by item nos. 2 and 4 is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.

As section 552.103 is the more inclusive exception you raise, we address it first. Section 552.103, the "litigation exception," provides in relevant part:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

¹You also inform this office that the district released much of the information that is responsive to the present request in response to a previous request for information.

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that is at issue. To sustain this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to the litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be established in order for information to be excepted from disclosure under section 552.103. *Id.*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

You inform us that the requested information relates to grievance proceedings before the school superintendent and the school board. You contend that “[t]he grievance hearings process should be viewed as quasi-litigation.” You explain that “[i]n the Level 3 Grievance hearing, each side will be given thirty minutes to present their facts and arguments. It is an adversarial, quasi-judicial proceeding.” You note that some grievances may be appealed to the Texas Commissioner of Education and that grievances are contested cases under chapter 157 of title 19 of the Texas Administrative Code. Alternatively, you assert that the district reasonably anticipates further administrative proceedings involving the Office of Civil Rights or the Texas Education Agency. You also inform us that the requestor has indicated the possibility of bringing a claim through the State Board for Educator Certification. We have considered each of these arguments. We conclude, however, that the district has not demonstrated that the district-level grievance proceedings qualify as “litigation” for purposes of section 552.103. *See* Open Records Decision Nos. 588 (1991) (concluding that contested case under Administrative Procedure Act, Gov't Code ch. 2001, qualifies as litigation under

statutory predecessor), 301 (1982) (concluding that litigation includes a contested case before an administrative agency). Furthermore, we find that the district has not provided the required concrete evidence that actual litigation is reasonably anticipated. *See* Open Records Decision Nos. 351 at 2 (1982) (stating that mere chance of litigation does not trigger statutory predecessor), 331 at 1 (1992) (stating that mere threats of litigation do not establish that litigation is reasonably anticipated), 328 at 2 (1982) (stating that statutory predecessor requires concrete evidence that claim that litigation may ensue is more than mere conjecture). Thus, as the district has not demonstrated that the requested information relates to pending or reasonably anticipated litigation, the district may not withhold the information under section 552.103.

Section 552.107(1) excepts from required public disclosure "information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct[.]" This exception protects information that an attorney cannot disclose because of a duty to the client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *See* Open Records Decision No. 574 at 5 (1990). Section 552.107(1) does not protect purely factual information and thus does not except from disclosure factual recounting of events or documentation of calls made, meetings attended, and memos sent. *Id.*

You inform us that the information in question relates to the accused principal's responses to the aggrieved employee's allegations. You state that the principal's responses were addressed to the district's legal counsel. You also state, however, that the responses were reviewed by both legal counsel and the school superintendent. You inform us that the superintendent presided over the Level II grievance hearing. Based on the information that you provided, we presume that the superintendent considered both the aggrieved employee's allegations and the principal's responses. For this reason, the principal's responses were disclosed to the superintendent for the purpose of his review. Based on these considerations, we find that the information relating to the principal's responses does not qualify as either a confidential communication to an attorney for the district or an attorney's legal advice. *See generally* ORD 574 at 3-5. We therefore conclude that the information relating to the principal's responses is not excepted from disclosure under section 552.107(1).

We note, however, that the submitted information contains references to the aggrieved employee's family members. Section 552.117(1) of the Government Code excepts from disclosure the home address, home telephone number, and social security number of a current or former employee of a governmental body, as well as information revealing whether the employee has family members, *if the current or former employee requested that this information be kept confidential under section 552.024*. *See* Open Records Decision

Nos. 622 (1994), 455 (1987). But you may not withhold this information in the case of a current or former employee who made the request for confidentiality under section 552.024 after the request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989).

In summary, the information at issue is not excepted from disclosure under either section 552.103 or section 552.107. Thus, with the possible exception of the information that may be protected under section 552.117 of the Government Code, the district must release the submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

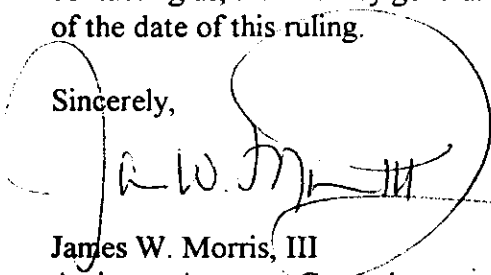
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 147191

Encl: Submitted documents

cc: Mr. Tony Conners
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(w/o enclosures)